

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-7161

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7161

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

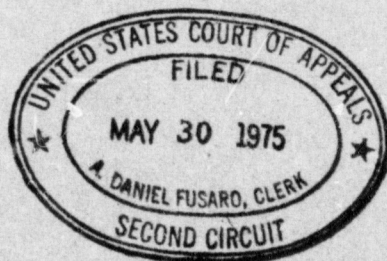
-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF
THE CITY OF NEW YORK, LOCAL 1, SASGC, AFL-CIO,

Intervenor-Appellant.

APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES



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NO. 75-7161

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THE BOARD OF EDUCATION OF THE CITY
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Defendant-Appellant

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS
OF THE CITY OF NEW YORK,
LOCAL 1, SASOC, AFL-CIO,
Intervenor-Appellant

APPEAL FROM AN ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal by defendant Board of Education and intervenor Council of Supervisors and Administrators from an order of the District Court for the Southern District of New York (Tyler, J.) entered February 7, 1975 (397a-407a)^{1/} clarifying and modifying its prior order of November 22, 1974 (327a-333a).

^{1/}This form of citation is to pages of the Joint Appendix

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this appeal, which purports to be from an order of February 7, 1975, but is in actuality from an order of November 22, 1974 which was modified in no relevant respect by the later order, should be dismissed as untimely?

2. Whether, in a case where minorities have been found to have been excluded from employment by racially discriminatory selection procedures, rules which provide for the "excessing" of employees on the basis of length of service and which, if implemented, will have a disparate adverse impact on such minorities, tending to negate previous remedial orders, are immune from judicial alteration?

3. Whether the relief granted by the District Court, which temporarily limits the use of seniority as the basis for excessing supervisors where such excessing would tend to negate previous remedial orders by its disparate adverse impact upon members of plaintiffs' class who, because of previous unlawful exclusion from employment, have, as a group, less seniority than others, must be upheld as not an abuse of discretion?

2/ "Excessing" refers to a procedure by which supervisory personnel whose positions are abolished, and those persons junior to them holding similar or lower positions, are re-located, bumped, demoted or terminated on the basis of their seniority. The excessing rules, as embodied in the collective bargaining agreement between the Board of Education and the Council of Supervisors and Administrators (CSA), are set forth in the Board's brief at 21-23.

STATEMENT OF THE CASE

This appeal involves a narrow issue in the complex litigation which has already resulted in three appeals to this Court, which has in two instances affirmed the decision of the District Court and in the third, dismissed the appeal without opinion. See Chance v. Board of Examiners, 458 F.2d 1167 (1972); Chance v. Board of Education, 496 F.2d 820 (1974); Chance v. Board of Examiners, Docket No. 74-1334 (May 17, 1974) (ruling from bench that order was not appealable).

1. Previous Related Proceedings

The case was initiated in September of 1970, by plaintiffs challenging the examinations used to select principals and other supervisors in the New York City School System on the ground that those examinations discriminated unconstitutionally against minority groups. After extensive proceedings the District Court issued, on July 14, 1971, an opinion granting plaintiffs' motion for a preliminary injunction on the ground that the examinations had been shown to be discriminatory and could not be justified as job related. 330 F.Supp. 203 (S.D.N.Y. 1971) (Mansfield, J.). That decision was upheld by this Court on April 5, 1972. 458 F.2d 1167 (Opinion of Feinberg, J.). Extensive negotiations and additional proceedings in the District Court resulted in the entry on July 12, 1973, of a Final Judgment against the defendant Board of Examiners and a modified Preliminary Injunction against the defendant Board of Education containing parallel provisions. Those orders --hereinafter referred to as the July 12

orders-- provided injunctive relief: (1) prohibiting the continued implementation of the old examination system previously found to be discriminatory; (2) ordering the institution of an interim system for filling vacant supervisory positions without regard to whether applicants possessed licenses as a result of the examination system previously found to be discriminatory; and (3) ordering the development of a permanent new selection system. Those orders are set forth at pp. 274-316a of the Appendix to the Board of Education's brief on the appeal to this Court in No.73-2320. (That Appendix provides a convenient compilation of many of the previous proceedings in this case.) The July 12 orders were upheld by this Court on April 12, 1974 496 F.2d 820 (Opinion of Feinberg, J.).

Several months after entry of the July 12 orders, plaintiffs learned that the Board of Education had ordered community school boards to fill supervisory vacancies in accordance with the "transfer list" provisions of the CSA contract. These provisions required that persons who had acquired seniority with licenses obtained under the old examination system be granted priority in consideration for all supervisory vacancies. This appeared to be in direct violation of those aspects of the July 12 orders guaranteeing plaintiffs' class an opportunity to compete on an equal basis for supervisory vacancies, and prohibiting implementation of any contractual provision which required that priority in filling such vacancies be given to persons licensed under the old examination system. Plaintiffs applied to the court for relief, and on December 27, 1973, Judge Mansfield, who had presided

over the case since its initiation, issued a memorandum opinion which he termed an interpretation of his own July 12 orders. That opinion, reported at 7 EPD ¶9084, concluded that:

"The purpose of the orders was to insure that in filling vacancies persons who had acquired or might acquire licenses as a result of the discriminatory testing system would not be given preference over otherwise qualified applicants in the making of appointments

For the foregoing reasons we conclude that the transfer provisions of the CSA agreement, by giving a preference to senior supervisory personnel, violates our Orders. This interpretation should not be construed as permanently prohibiting the use of seniority as a basis for selection and appointment of applicants. Following the adoption of a permanent non-discriminatory system for the selection of supervisors in the New York City School System there will undoubtedly come a time when seniority among those selected under such a system can be appropriately recognized. To give preference to those appointed under a discriminatory testing system, however, which is the effect of the CSA agreement's transfer provisions, would be to reward the very discriminatory practices which we have outlawed.

7 EPD at p. 6575 (Emphasis added). No appeal from this order was taken. On February 25, 1974, Judge Tyler, to whom the case was assigned in January 1974, issued an order declining to rescind or alter Judge Mansfield's decision of December 27. CSA appealed from this order, and this Court dismissed the appeal from the bench on the ground that the order of February 25, 1974 was not appealable. Docket No. 74-1334 (May 7, 1974).

2. The Order Below

In July 1974, the Board of Education submitted to the District Court a copy of its proposed rules to govern the "excessing" of school supervisors (35a). As in the case of transfers, plaintiffs

were concerned that implementation of any rules which required that supervisory personnel be excessed in order of reverse seniority would be incompatible with the July 12 order. After two hearings on July 25 and 30, Judge Tyler issued an order dated July 30, 1974, enjoining all involuntary inter-district excessing until the Board of Education could provide detailed information about the impact of its proposed excessing rules (86a-89a). There followed three more hearings, on September 13, October 10 and November 8, 1974, and the submission of numerous letters, proposed orders and affidavits from plaintiffs, the Board of Education, CSA, which had been permitted to intervene,^{2a/} and the New York School Boards Association, which had been permitted to participate as Amicus (98a-326a).

At the November 8 hearing, the trial court noted that

[A]lthough there is not as much information about excessing or possible excessing for the present or in the foreseeable future which is a matter of record, there is sufficient information from the material filed by the city at the request of the Court to indicate that the plaintiffs are entitled to some order of the Court to protect them in the rights under federal law which they have achieved in this litigation.

In short, as I see it, and as I saw it when we submitted this [proposed] order to you yesterday, it was designed to protect the plaintiffs' class by merely requiring that their percentage representation among supervisors in the City of New York does not diminish because of such items as budgetary restraints which necessitate excessing or layoffs. (237a-276a)

The order issued November 22, 1974 froze the application of seniority excessing rules at the point where the proposition of

^{2a/}The scope of CSA's intervention was limited to questions regarding the interpretation, modification or abrogation of the excessing provisions of its collective bargaining agreement with the Board of Education.

of Title VII do not limit the remedies available under Section

blacks and Hispanics excessed would exceed their present representation in each school district and in the school system as a whole (327a-333a). Neither the Board of Education nor CSA appealed from this order.

By letter of December 17, the Board of Education requested modification of the November 22 order (334a-335a) and at a hearing on December 20 the District Court agreed that the order should be clarified in four respects, none of which is the subject of this appeal (340a-341a). Having received several additional letters, affidavits and proposed orders (358a-394a), Judge Tyler, on February 7, 1975, issued an order clarifying and modifying his November 22, 1974 order (395a-407a)^{3/}. As admitted by the Board of Education, the later order "contained the same racial quota system established in the November 22 order", simply modifying it in response to certain administrative problems and providing more detail with respect to the establishment of the three pools, black, Hispanic, and other, for the purposes of excessing or re-assignment (Board of Education brief at 16). The CSA also concedes that "the basic concept of excessing according to racial quota, not according to seniority of service, was maintained" in the February 7, 1975 order (CSA brief at 17). It is from the February 7, 1975 order that the Board of Education and CSA have appealed.

^{3/}For the Court's convenience Appellees have attached as Appendix A to their brief a copy of the February 7, 1975 order indicating additions to and deletions from the November 22, 1974 order.

3. Subsequent Proceedings

On March 25, 1975, the District Court, upon consent of the Board of Education, entered against the Board of Education the final judgment previously entered, on July 12, 1973, against the Board of Examiners. The March 25 order contains a plan for the development of a permanent selection and licensing system as well as extensive reporting provisions. Subsequently, by order dated April 4, 1975, the District^{Court} ruled that plaintiffs were entitled to an award of counsel fees in an amount to be determined. Upon Judge Tyler's appointment to the position of Deputy Attorney General, the case was re-assigned to Judge Pollack.

STATEMENT OF FACTS

Prior to the preliminary injunction issued in this action by Judge Mansfield in 1971, which enjoined defendants from issuing licenses or making appointments or assignments on the basis of any previously administered supervisory examination procedures, the ranks of principal and assistant principal in the New York City School System numbered at most 5% minority members. In the predominant category affected by the excessing proposals, assistant principal (see p.1 of "Summary" annexed to Affidavit of Frank C. Arricale, following 146a), the percentage was only 7%. Only 1% of those serving as principal, to which assistant principalships are a stepping stone, were drawn from the minority group. Chance v. Board of Examiners, 330 F.Supp. 203,208 (S.D.N.Y. 1971).

The record contains no precise evidence as to present minority representation among supervisory personnel. Nor does it contain conclusive evidence as to the impact of "excessing" on plaintiffs' class. However, of 63 supervisors whom the Board of Education contemplated excessing or terminating as of September 20, 1974 (see p.1 of "Summary" following 146a), 45 are white; 17 are black or Hispanic; 1 is "Uncertain". Of the 28 supervisors who would be terminated, 12 are minority. Thus, at least 27% of those who would be adversely affected by "excessing" are minorities and 43% of those who would be most severely affected, i.e., terminated, are minorities. ^{4/} In a letter dated December 17, 1974, Leonard Bernikow, counsel to the Board of Education, stated that "The

^{4/} Both the Board of Education and CSA assert, somewhat inaptly that the excessing procedure (which is explained in detail in CSA's brief at 5-7) is beneficial, in that it provides a means of relocation to prevent terminations or demotions and that it prevents discrimination by providing a neutral basis, i.e., seniority, for such relocation (94a, 184a). They imply that plaintiffs' wish to eliminate all excessing rules and regulations (132a-133a, 179a).

The issue of course, is not whether relocation is preferable to demotion or termination, but whether being excessed is preferable to not being excessed. Plaintiffs contended (56a) and the court below found that excessing even without layoff, e.g., being relocated "from the bottom of Brooklyn . . . to the top of the Bronx" would be found burdensome by many (70a). The Court's orders of November 22 and February 7, far from eliminating excessing rules, simply reallocate whatever disproportionate burden might result from their application to plaintiffs' class. Within the three groups, persons will be excessed in accordance with their seniority. Any supervisor who wishes to be re-assigned under the normal excessing rules may volunteer (403a).

previous figure of approximately 60 excessed supervisors would increase three-fold since this figure was based solely on inter-district excessing rather than including intra-district excessing" (334a-335a). (Emphasis in original).

As Judge Tyler recognized, the record is far from conclusive as to the racial impact of any excessing which may occur.^{4a/} His prophylactic orders of November 22 and February 7 simply assure that whatever excessing does take place will not undo the effects of the other remedial decrees achieved in this long and difficult litigation..

^{4a/} The absence of more complete data must be ascribed to the failure of the Board of Education to supply information within its control despite the court's direction in its order of July 30, 1974 (88a).

ARGUMENT

INTRODUCTION AND SUMMARY

The appeals of the Board of Education and CSA should be dismissed as untimely. While they purport to be appeals from an order of February 7, 1975, in actuality they are appeals from an order entered November 22, 1974 which was altered in no relevant respect by the subsequent order of clarification and modification.

Assuming that the appeals are timely, the order below should be summarily affirmed on the ground that it involves solely a question as to details of relief which this Court has stated "should be almost the last to attract appellate intervention". Vulcan Society of the New York Fire Department, Inc. v. Civil Service Commission of the City of New York, 490 F.2d 387, 399 (2d Cir. 1973) ("Vulcan").

Moreover, there can be no question in this case as to the propriety of the relief provided, since orders barring the continued implementation of seniority provisions to prevent the perpetuation of the effects of past discriminatory practices and granting preferential treatment to minority employees to place them in the position they would, as a group, have been in, but for the employer's unlawful practices, have become standard forms of relief approved by this Court in both public and private employment discrimination cases. Patterson v. Newspaper & Mail Deliverers' Union, — F.2d —, 9 EPD ¶10,033 (2d Cir., 1975);

Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974) ("Rios"); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973) ("Bridgeport"); Vulcan, supra; United States v. Wood, Wire and Metal Lathers International Union, Local 46, 471 F.2d 408 (2d Cir.) cert. denied, 412 U.S. 939 (1973) ("Lathers"); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).

Neither the Board of Education nor CSA takes issue with plaintiffs' assertion that implementation of the seniority excessing rules will have a disproportionately adverse impact upon minority supervisors. They contend, however, that "last hired, first fired" practices are immunized from judicial alteration by the language of Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) and that this language applies to the instant action, which was brought not under Title VII, but under 42 U.S.C. §§ 1981 and 1983. Neither the language of Section 703(h) nor its legislative history supports the construction advanced by appellants. In any event the District Court clearly had the authority to suspend the operation of the seniority excessing rules under Sections 1981 and 1983 which provide remedies for employment discrimination independent of those provided by Title VII.

The ordered relief, which does no more than limit the application of seniority to assure that minority representation in the supervisory ranks of the New York City School System will not decrease as a result of "excessing", such order to remain in

effect only until November 1977, is far more limited than relief approved by this Court in the above-cited cases.

What the record in this case demonstrates beyond a doubt is that the District Court arrived at its decision only after an exhaustive examination and careful weighing of all the relevant facts and competing policy considerations. Judge Tyler held six hearings and received numerous letters, affidavits, briefs and proposed orders dealing with the excessing issue -- with inter-district excessing and intra-district excessing, with problems of the Board of Education and of the community school boards, with the relative status of supervisors who are appointed, or assigned but not appointed, or unlicensed but subject to evaluation. Being satisfied with none of the solutions presented to him, he himself drafted an order, which he later modified, after further argument, to deal with certain administrative problems. He designed the order to protect prior orders in this case, which orders have been unanimously affirmed by this Court, with an eye to the least possible disruption of normal procedures (247a-248a, 255a, 274a-277a). Surely the action taken by the District Court cannot be considered an abuse of discretion.

THE APPEALS BY THE BOARD OF EDUCATION AND
CSA, BEING IN EFFECT APPEALS FROM THE
ORDER OF NOVEMBER 22, 1974, ARE UNTIMELY

Judge Tyler's order of February 7, 1975 clarified and modified his prior order of November 22, 1974 in the following respects (see 340a-341a and Appendix A to this brief):

- 1) It made clear that the date of assignment of a supervisor constitutes his date of appointment for all purposes, unless the appointing authority notifies the Board of Education and the supervisor that it did not intend the assignment to be a permanent appointment, in which case the supervisor will be considered appointed for purposes of the "excessing" order only (Paragraph II.C);
- 2) It added two paragraphs elaborating on the method of computation to be employed in implementing the order with respect to intra-district excessing and inter-district excessing, respectively (Paragraphs III.C and D.);
- 3) It made clear that any supervisor could volunteer for transfer and would not be counted in determining the numbers of excesses (Paragraphs III.E.);
- 4) It provided for oversight of intra-district excessing by designees of the local appointing authorities (Paragraph V.B.); and
- 5) It provided that any intra-district excessing that took place before November 22, 1974 was not affected by the order. (The order of July 30, 1974 had enjoined only inter-district excessing) (Paragraph VII).

The appeals by the Board of Education and the CSA are directed to none of these issues. Rather, they attack the substance of the November 22 order, which the later order merely reiterated, to wit, that with respect to inter-district excessing and intra-district excessing, the percentage of excessed supervisors who are black or Hispanic shall be no greater than the ^{4b/}percentage of all supervisors who are black or Hispanic.

Even if it is assumed that the November 22 order was ap-
^{5/}pealable neither the Board of Education nor the CSA appealed from it. Similarly, while the February 7 order may be an appealable order, the scope of review should properly be limited to those aspects of the order, if any, which constitute substantive new action. To the extent that the court is merely interpreting or clarifying provisions of a previous order, a subsequent interlocutory is not appealable. S.E.C. v. Investment Corp. of America, 369 F.2d 383 (7th Cir. 1966). Any other rule would permit parties to obtain review at any time merely by requesting interpretations or clarifications of orders previously entered, thereby avoiding the rules regarding timely appeals.

^{4b/}It is clear that Point II of the Board of Education's brief (pp.40-43) is an attack not on the provisions dealing with the administrative details of intra-district excessing added to the February 7 order, but rather is addressed to the question of whether there should be any limitation on intra-district excessing. The November 22 order explicitly applied to intra-district as well as inter-district excessing and the February 7 order contained no substantive changes in this regard.

^{5/} Arguably, the November 22 order was, as was Judge Mansfield's order on transfers, 7 EPD ¶9084, merely an interpretation of the July 12 orders (see pp. 4-5, supra).

This kind of device has been clearly rejected by the courts. See, e.g., Stiller v. Squeeze-a-Purse Corp., 251 F.2d 561 (6th Cir. 1958) (holding that the party who failed to take a timely appeal from the first order refusing to modify injunction cannot lay new basis for appeal simply by making renewed motions for modification).

The Supreme Court of the United States has held that only a material, substantive change in an order can toll the period of limitations on appeal from that order:

[T]he mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken . . . begin to run anew.

Federal Trade Commission v. Minneapolis-Honeywell R. Co., 344 U.S. 206, 212 (1952).

The present appeals from the order of February 7 are in essence an attempt by the Board of Education and CSA to collaterally attack the November 22 order. Appellants had an opportunity to seek review at the time that order was entered. Their failure to pursue their appeal rights at that time cannot be remedied by an attack on the District Court's subsequent clarification (and modification in no relevant respect) of its order.

II

THE SENIORITY EXCESSING RULES ARE AMENABLE TO ALTERATION, AS AN ADJUNCT TO RELIEF PREVIOUSLY AWARDED, TO ENABLE PLAINTIFFS TO RETAIN THE BENEFITS THEY HAVE ACHIEVED IN THIS LITIGATION

A. Because Of Defendants' Past Discrimination in Selection Of Supervisors, Blacks and Hispanics Could Not Have Enough Seniority To Withstand Being Excessed in Disproportionate Numbers

Appellants are calling upon this Court to hold that employers who have in the past discriminated against minorities in the hiring process will be permitted to accord preferences among their employees on the basis of length of service-- a standard which will necessarily disadvantage the previously excluded group.

In the instant case, two governmental bodies, defendants Board of Education and Board of Examiners, employed selection procedures found to be unlawful in that they screened out disproportionate numbers of blacks and Hispanics and were not job-related, until they were enjoined from doing so in 1971. (As of this date, they have not developed new non-discriminatory selection procedures.) A substantial number of minorities have since been appointed in accordance with interim procedures set forth in the July 12, 1973 orders. Any "excessing" based on seniority would necessarily fall with disproportionate impact upon minority supervisors.

Apart from the strict application of seniority, there are numerous possible procedures for effecting a reduction of the work force that do not refer to the length of prior service. Supervisors could be retained on the basis of their relative merit or performance. The names of supervisors to be excessed

could be selected at random. The available work could be allocated or rotated among those supervisors willing to work less than full time. Or, as ordered by the District Court, excessing could be allocated among blacks, Hispanics and whites in proportion to their numbers in the work force, and within each racial group, supervisors laid off on the basis of length of service. None of these procedures would have differential racial impact. In other words, excessing need not reduce the proportion of minorities in each district or city-wide. But the procedure mandated by the Board of Education - CSA collective bargaining agreement was the selection of employees for excessing on the basis of their length of service. There is nothing per se objectionable about this procedure, except for the fact that, because of this employer's past discrimination against minorities, the standard is one which minorities cannot meet. Its application gives current effect to the past discrimination: because minorities were not employed in the past, and for no other reason, they are more vulnerable to excessing in the present.

This Court and other Courts of Appeals have consistently held that "neutral" employment practices are unlawful when they perpetuate the effects of past discrimination. For example, courts have uniformly held unlawful departmental or job seniority systems in plants where incumbent blacks were formerly excluded from preferred jobs or departments. See, e.g. United States v. Bethlehem Steel Corp., supra, 446 F.2d at 657-59; Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971); Local 189, United Papermakers

and Pap workers v. United States 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); Head v. Timken Roller Bearing Co., 486 F.2d 870, 879 (6th Cir. 1973); United States v. St. Louis-San Francisco Ry. Co., 464 F.2d 301 (8th Cir. 1972) (en banc); Quarles v. Philip Morris Inc., 279 F.Supp. 505 (E.D. Va. 1968). And in a series of cases involving craft unions, the courts have held that unions could not base priority in work referrals on length of union membership or length of service under the union contract where in the past minorities were excluded from union membership or from work under the contract. See, e.g. United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968) aff'd. as later modified sub nom United States v. Electrical Workers Local 212, 472 F.2d 634 (6th Cir. 1973); EEOC v. Plumbers Local 189, 311 F. Supp. 468 (S.D. Ohio, 1970), vacated on other grounds, 438 F.2d 408 (6th Cir. 1971), cert. denied, 404 U.S. 832 (1971). Cf. Patterson v. Newspaper & Mail Deliverers' Union, supra.

In all these cases, the basis for the finding that seniority or referral systems based on length of service were discriminatory was past discrimination which prevented blacks from working in the relevant seniority unit. Where an employer, such as defendant Board of Education in this case, discriminated against minorities in the hiring process, the relevant seniority unit is the entire supervisory work force. In this situation, it is discriminatory to base the rights of newly hired minority employees on their length of service as supervisors.

B. The District Court Had the Authority to Alter the Application of the Seniority Excessing Rules Under 42 U.S.C. §1981

Section 1981, which forbids racial discrimination in the making of contracts, includes within its prohibition any racial discrimination in employment. Johnson v. Railway Express Agency 43 U.S.L.W. 4623, 4625 (May 19, 1975).

Section 703(h) of Title VII should not be read to bar the relief provided by the District Court under Section 1981. Defendant Board of Education, arguing that Section 703(h) immunizes the seniority excessing rules from judicial alteration and applies to this case, brought pursuant to 42 U.S.C. §§ 1981 and 1983, relies upon Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. filed February 21, 1975, No. 74-1064. In Waters, the Court held that Section 703(h) of Title VII prohibited the granting of retroactive seniority to persons denied employment because of their race, and "having passed scrutiny under the substantive requirements of Title VII, the employment seniority system... is not violative of 42 U.S.C. Section 1981". 502 F.2d at 1320 n.4.

The contrary position was taken in Watkins v. United Steel Workers, 369 F. Supp. 1221 (E.D. La. 1974), appeal docketed 5th Cir. No. 74-2604 (June 17, 1974). In that case the court prohibited the use of seniority in determining which employees would be laid off and recalled. The District Court held that it was a clear violation of Title VII to make employment decisions on the basis of length of service where blacks had been, by virtue of prior discrimination, prevented from accumulating seniority. 369 F. Supp. at 1226-27. The Court further held that the provisions

of Title VII do not limit the remedies available under Section 1981, Id. at 1230-31. Other District courts have followed Watkins^{6/} and Judge Tyler found its reasoning persuasive (396a).

The summary rejection, by the Seventh Circuit in Waters, of plaintiffs' right to relief under Section 1981 is squarely in conflict with the Supreme Court's decisions in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) and Johnson v. Railway Express Agency, supra. In Alexander, the Court rejected the contention that aggrieved employees were limited to any single remedial provision:

. . . . (L)egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination⁷.... (T)he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.

^{7/} See, e.g., 42 U.S.C. Section 1981 (Civil Rights Act of 1966); 42 U.S.C. Section 1983 (Civil Rights Act of 1871).

415 U.S. at 47-49. In Johnson, decided after Waters, the Court, after reviewing the legislative history of Title VII and some of the differences between Title VII and Section 1981, concluded:

[T]he remedies available under Title VII and §1981 although related, and although directed to most of the same ends, are separate, distinct, and independent.

43 U.S.L.W. at 4626 (emphasis added).

Lower courts have, consistent with Alexander and Johnson, rejected attempts to impose on other remedies the limitations applicable to Title VII. See, e.g., Contractors Association of

^{6/}Delay v. Carling Brewing Co., 9 EPD ¶19877 (N.D. Ga. 1974); Loy v. City of Cleveland, 8 FEP Cases 614 (N.D. Ohio 1974); Schaefer v. Tannian, 9 EPD ¶10,142 (E.D. Mich. 1975).

Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 172 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971) (Section 703(j) of Title VII could not limit the remedial scope of Executive Order 11246); Guerra v. Manchester Terminal Co., 498 F.2d 641, 653-54, (5th Cir. 1974) (Title VII's failure to prohibit discrimination in favor of citizens does not limit the protection afforded aliens by Section 1981). See also, Rios, supra, 501 F.2d at 638 (2d Cir. 1974) (Hays, C.J., dissenting) ("Neither [referring to Vulcan Society and Bridgeport Guardians] was a Title VII action, so in neither case was the District Court inhibited by Section 703(j) [of Title VII]").

The Seventh Circuit's decision in Waters, imposing on Section 1981 the limitations which it believed to exist under Title VII is precisely the approach which has been rejected by the Supreme Court in Alexander and Johnson, and should not be followed by this Court. Rather, the Court should view Sections 1981 and 1983 as authorizing the District Court to grant that relief which on the facts of this case, will most effectively protect its prior orders.

Any discussion of Section 703(h) becomes irrelevant to this case in light of Johnson v. Railway Express Agency, supra, and we do not wish to burden the Court at this point with extensive arguments as to the meaning of this section. However, inasmuch as both appellants have grounded their attack on Judge Tyler's orders on their reading of Section 703(h), we have included a response thereto in Appendix B to this brief.

C. In The Context Of Past Hiring Discrimination, Employment Date Seniority Discriminates Against Blacks and Hispanics as a Group and Group Relief Is Appropriate

Appellants repeatedly refer to the fact that the order of the court below could benefit minorities who may never have taken one of the discriminatory examinations for school supervisor, e. g., Board of Education brief at 35-36; CSA brief at 19, 28-29, 48. It appears that appellants may be willing to recognize that if minority candidates were formerly rejected because they failed discriminatory examinations, it would be discriminatory as to them to allocate employment practices based on length of service: the Board proposes to give such persons seniority for excessing purposes based "on the mean (midpoint) date of appointment from the list of the examination"^{7/}(365a). However, the class benefited by this action is much broader. Judge Mansfield, recognizing that minority failure rate discouraged many from taking the supervisory examinations and that racial discrimination is class discrimination calling for class relief without requiring either victims or beneficiaries to be identified individually, defined the plaintiff class in this case as:

[A]ll Blacks and persons of Puerto Rican origin or descent who 1) have failed examination for supervisory positions in the New York City School System; or 2) have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance; or 3) have taken such supervisory examinations and have been or are in the process of being

^{7/} It is estimated that only 3% of the post-injunction appointees would fall in this category (378a).

evaluated for eligibility lists to be promulgated; or 4) are eligible or will be eligible for supervisory examinations to be given in the future.

Chance v. Board of Examiners, 6 EPD ¶1897^{8/} (S.D.N.Y. 1973).

In other situations involving the application of fair employment laws, the courts of this circuit and others have deemed it appropriate to impose affirmative requirements to terminate employment discrimination even though the beneficiaries of the remedy may not be the victims of past discrimination. For example, when employers have been found to discriminate against minorities in hiring, temporary quotas have been imposed requiring the employment of minorities at a rate higher than their proportion of the available work force. See, e.g., Patterson, supra; Rios, supra; Bridgeport, supra; Vulcan, supra; Lathers, supra; Pennsylvania v. O'Neill, 473 F.2d 1029 (3rd Cir. 1973) (en banc); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (en banc); United States v. Electrical Workers, Local 212, 472 F. 2d 634 (6th Cir. 1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972) (en banc).

^{8/}The final judgment, entered July 12, 1973 (see Appendix in No. 73-2320 at 308a), contains a modified version of the class definition:

The class consists of all blacks and persons of Puerto Rican or Latin American descent or origin who would have been or may become eligible for regular appointments to supervisory positions in the New York City School System but for their failure to possess the licenses which have in the past been issued on the basis of the supervisory examination procedures hitherto conducted by defendants.

In these situations, some minorities will be employed who would not be employed under a color blind standard, and it would be only coincidental if any of these persons were discriminatorily denied employment in the past. The relief is not designed to remedy the past wrong to rejected minority applicants, but to insure that that past discrimination does not result in the continued exclusion of minorities. A similar result, i.e., a requirement of quota hiring of minorities who have not themselves been the victims of past discrimination, is mandated by affirmative action plans imposed under Executive Order 11246. See, e.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra. The actual victims of the past discrimination cannot be identified; a remedy that benefits members of the group that was discriminated against is nevertheless mandated by fair employment practices.

In the segregated plant cases, the seniority remedy has been extended to all black employees hired during the period of discrimination, although it is clear that absent discrimination not all of them would have been assigned to the department to which they now seek transfer.

[I]t is true that some of the black employees might have been assigned [to all black departments] even under the best of systems. But there is no apparent way of knowing that, or determining now who they would be, . . . The discrimination found illegal here was to a group; group remedy is therefore appropriate.

United States v. Bethlehem Steel Corp., supra, 446 F.2d at 660 (2d Cir. 1971) (footnote omitted).

The same principles apply here. Because of defendants' past discrimination, few minorities have enough seniority to avoid being excessed. The standard by which excessing is achieved, i.e., seniority, is therefore racially tainted. As Judge Mansfield stated with respect to the transfer provisions (pp.4-5, supra):

To give preference to those appointed under a discriminatory testing system, however . . . would be to reward the very discriminatory practices which we have outlawed.

7 EPD at 6575.

There having been class discrimination, the prior orders granting class relief must be protected.

D. Seniority Expectations May Be Altered To Promote the National Policy Against Racial Discrimination in Employment

Defendant Board of Education concedes that the seniority excessing system will have a greater impact on minority employees who, having been previously excluded by discriminatory practices, have been recently hired (Board of Education brief at 33). It asserts, however, that preservation of this system deserves a higher place in our scheme of public policies than enforcement of the ban on racial discrimination embodied in the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution (Id. at 33-34). This position is without support in either principle or precedent.

The national policy against racial discrimination is of the "highest priority". Newman v. Piggie Park Enterprise, Inc., 390 U.S. 400, 402 (1968. Accord: Bradley v. Richmond School Board, 416 U.S. 696, 719 n.27; Alexander v. Gardner-Denver Co., 415 U.S. 36, 48, (1974).

While the importance of seniority expectations to employees must be acknowledged, this Court and others have clearly established that these expectations must give way to overriding public interests, including the interest in the elimination of discrimination in employment. E.g., Ford Motor Co. v. Huffman, 345 U.S. 330 (1952); United States v. Bethlehem Steel Corp., supra; Patterson v. Newspaper and Mail Deliverers' Union, supra, 9 EPD at p.7274; Quarles v. Philip Morris, Inc., supra. Of particular pertinence are the words of this Court in United States v. Bethlehem Steel Corp., supra:

Appellees also argue that the morale of employees who did not suffer discrimination will suffer if rate retention and seniority carryover are ordered. But in the context of this case that possibility is not such an overriding business purpose that the relief requested must be denied. Assuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations derived from a bargaining agreement subject to modification If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.

446 F.2d at 663. This language applies with even greater force to the instant case, where the order appealed from does no more than protect the gains made to date by this litigation by preserving the present level of minority representation in the supervisory work force.

III

THE DISTRICT COURT DID NOT ABUSE ITS
DISCRETION IN ORDERING THE TEMPORARY MODIFICATION
OF SENIORITY EXCESSING RULES TO THE EXTENT
NECESSARY TO MAINTAIN THE CURRENT LEVEL OF MINORITY
REPRESENTATION AMONG SUPERVISORY PERSONNEL

As has been discussed at Point II, supra, the District Court did not err as a matter of law in issuing its orders of November 22 and February 7. Nor did it, on the facts of this case, abuse its discretion by allocating the burdens of excessing proportionately among blacks, Hispanics and whites.

This Court has recognized as "the basic tenet" in passing upon relief granted by a trial court in a case of this sort that "the District Court, sitting as a court of equity, has wide power and discretion to fashion its decree not only to prohibit present discrimination but to eradicate the effects of past discriminatory practices." Bridgeport, supra, 482 F.2d at 1340, citing Louisiana v. United States, 380 U.S. 145, 154 (1965) and Lathers supra, 471 F.2d at 413. In Vulcan, this Court, quoting International Salt Co. v. United States, 332 U.S. 392, 400 (1974) stated, "The framing of decrees should take place in the District rather than in the Appellate Courts." 490 F.2d at 399. Most recently, in Rios, 501 F.2d at 631, this Court reiterated its determination to leave the nature and extent of relief from past discrimination to the sound discretion of the trial judge.

There are numerous alternatives to the length-of service standard for effecting a reduction in the work force, none of which would have the effect of perpetuating past discrimination,

e.g., merit, sharing of the available work, or the method selected by the court below. The above-cited cases are ample authority for the proposition that the determination of the particular procedures to be used in eliminating the continuing effects of the past exclusion of minorities from supervisory positions, particularly in the context of protecting the court's prior orders, is confided to the lower court's sound discretion.

This Court has repeatedly affirmed relief of the type mandated by the District Court. In the private employment context, it has held that "while quotas to attain racial balance are forbidden, quotas to correct past discrimination are not." Lathers, supra, 471 F.2d at 413. See also, Rios, supra, 501 F.2d at 629 and Patterson, supra, 9 EPD at p.7272. It has noted with full approval that "Section 1983 cases have also granted relief by sanctioning quotas aimed at curing past discrimination." Bridgeport, supra, 482 F.2d at 1340. In each of the cited cases, this Court affirmed (in relevant part) vigorous decrees including preferential hiring requirements or quotas. The element that makes the affirmative provisions both lawful and necessary is proof of prior discrimination or its continuing effects. Louisiana v. United States, supra, Bridgeport, supra, 482 F.2d at 1340.

The purpose of any court-ordered relief is to place minority employees, who, as a group, have been the victims of past discrimination, in the position they would have been in but for

the employer's unlawful practice. As this Court stated in Rios, supra:

[I]t is readily apparent that if the rights of minority members had not been violated, many more of them would enjoy those rights than presently do so and that the ratio of minority members enjoying such rights would be higher.

501 F.2d at 631.

If a hiring preference is permissible to achieve the ratio of minorities that would have been employed but for past discrimination, then a fortiori a retention preference which merely preserves the employment status of minorities achieved pursuant to previous court orders cannot constitute an abuse of discretion.

Of the various options available, the "excessing" plan adopted by the court below is the one least disruptive of normal procedures. When a position in a particular school district is eliminated, the least senior person in the job classification used to fill that position, e.g., assistant principal, is "excessed", i.e., transferred, demoted, or terminated, provided only that Blacks and Hispanics shall not be "excessed" in numbers disproportionate to their representation in the district, or in the city, as the case may be. Any person wishing to transfer from a supervisory position in one district to a comparable position in the same or another district, may do so and will not be considered "excessed" for purposes of the order.

Furthermore, the order suspending normal operation of the seniority excessing rules is of short duration. See Patterson v. Newspaper and Mail Deliverers' Union, supra, 9 EPD at p.7275 (Concurring opinion by Feinberg, C.J.). It will be in effect only until November 30, 1977, by which time, it is hoped, a substantial degree of staff replacement increasing the proportion of minority representation among supervisors will assure that reinstitution of seniority excessing will not reinstitute discriminatory employment patterns. See Chance v. Board of Examiners, supra, 7 EPD at 6575.

With respect to appellants' protestations as to the burdensomeness of the intra-district excessing provisions of Judge Tyler's orders, this concern is not shared by those charged with the duty of administering these provisions, the Community School Boards. See, Brief Amicus Curiae of the New York City School Board Association.

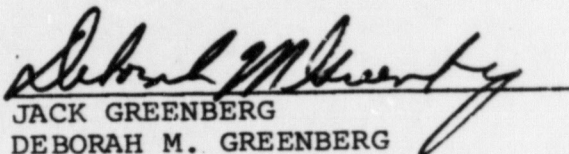
In sum, what is presented here is a carefully drafted remedial order "fully protecting the plaintiffs' class in the achievement of the rights which they have recognized in this federal litigation" and "which [does] not meddle unnecessarily . . . in issues of state law, contract obligations and school districts; whether they are community districts' or the central district's, policy." (274a). There could be no better example of the exercise of a trial court's sound discretion.

CONCLUSION

For the reason stated above, this Court should dismiss the appeals as untimely or summarily affirm the order of February 7, 1975.

Dated: New York, New York
May 30, 1975

Respectfully submitted,



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APPENDIX A

The attached Order of February 7, 1975 has been retyped and marked to indicate the respects in which it differs from the November 22, 1974 Order (327a-333a).

Portions which were deleted are inserted in brackets; portions which are new are underscored.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

BOSTON M. CHANCE, LOUIS C. MERCADO,
et al.,

Plaintiffs,

ORDER

-against-

70 Civ. 4141 HRT

THE BOARD OF EXAMINERS AND THE
BOARD OF EDUCATION OF THE CITY
OF NEW YORK, et al.,

Defendants.

-----X

Plaintiffs and defendant Board of Education (hereinafter "defendant") having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued

implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, [Board of Education,] the CSA as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented; and the Court having made its findings in the record at the hearing on November 8, 1974, and having issued an Order thereon dated November 22, 1974; and the Court having subsequently considered certain administrative problems which defendant represented were entailed in implementing said Order; and the parties on January 24, 1975 having submitted counter proposals for modification thereof,

IT IS HEREBY ORDERED:

This Court's order of November 22, 1974, rescinding its prior Order of July 30, 1974 and setting forth provisions

to govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system is clarified and modified to read as follows: [This Court's Order of July 30, 1974 is rescinded and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system.]

I. Definitions

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-the-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

II. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position, whether on an acting or regular basis, in the New York City public school system (or, where appropriate for the purposes of this order, within the jurisdiction of the relevant appointing authority) as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into three groups. Group A shall consist of all Black supervisors. Group B shall consist of all supervisors of Puerto Rican or Latin American descent or origin. Group C shall consist of all supervisors not in Group A or Group B.

supervisors not in Group A or Group B.

B. Any person otherwise qualified to be in Group A, B, or C shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed; and

b. he has failed to take or complete or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

C. For purposes of implementing this order, the date of appointment of a supervisor not excluded from [its] the operation of this order shall be [deemed to be] the earlier of:

(1) the date on which he was appointed to his position, [or] and

(2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendant[s]. Such date shall constitute the date of appointment for such supervisors

for all purposes, and the appointment shall have the same effect as it would have were it made in accordance with the law, rules, and procedures which were applicable before court orders in this case enjoined their application; provided that if the appropriate appointing authority notifies such supervisor and the Director of Personnel of the Board of Education, in a written certificate and within forty-five (45) days after such supervisor has received a supervisory license or within forty-five (45) days after the date of this order, whichever is later, that the appointing authority did not intend to appoint the supervisor when it assigned him and that it does not now wish to appoint him permanently, then he shall be considered appointed only for the purposes of implementing this order. Failure of the appointing authority to so act within the requisite forty-five (45) day period shall constitute automatic appointment. This subparagraph shall not be construed to deny the appointing authority's or the supervisor's rights, if any, to enter into employment contracts pursuant to N.Y. Ed.Law § 2573.

D. A person occupying a supervisory position shall not be excessed until the results of his examination or re-examination have been evaluated if

1. he has not had an opportunity to take or complete an examination for a supervisory license, although

he has been assigned to a supervisory position for more than five months and is eligible for on-the-job evaluation; or

2. he is in the process of taking an examination or re-examination for a supervisory license; or

3. the results of his examination or re-examination have not been evaluated,

unless he could be excessed even if he held a supervisory license valid as of the date of his original assignment to a supervisory position.

III. Excessing:

A. The total number of supervisors shall be calculated separately for Group A(A), for Group B(B), and for Group C(C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups ($A+B+C$). The proportion that A bears to the total ($A+B+C$) shall be calculated ($A/(A+B+C)$). The proportion that B bears to the total ($A+B+C$) shall be calculated ($B/(A+B+C)$).

B. The number of supervisors in Group A who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed $A/(A+B+C)$. The number of supervisors in Group B who are to be excessed at any time divided by the total number

of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed $B/(A+B+C)$.

C. For purposes of intra-district excessing within the jurisdiction of an appointing authority, these numbers and ratios shall be calculated on the basis of the numbers of supervisors then acting under the jurisdiction of that appointing authority and shall be applied to all intra-district excessing within the district of that appointing authority. Such intra-district excessing shall be administered by each appointing authority, subject to the duties of paragraph V herein and subject to the reporting requirements of paragraph VI herein.

D. For purposes of inter-district excessing from the jurisdiction of one appointing authority to the jurisdiction of another appointing authority, these numbers and ratios shall be calculated on the basis of the number of supervisors acting throughout New York City and shall be applied to all inter-district excessing. Such inter-district excessing shall be administered by the Executive Director for Personnel of the Board of Education, subject to the duties of paragraph V herein and subject to the reporting requirements of paragraph VI herein.

E. Any supervisor in Group A, B, or C who volunteers in writing, after having been fully advised of his excessing rights under this order, to be transferred from a supervisory position in one district to a comparable supervisory position in the same district or in another district shall not be considered excessed for purposes of this order; provided, however, that the new position is expected to continue in existence for at least one (1) year from the date of the transfer. Each appointing authority shall administer all voluntary intra-district transfers within its jurisdiction subject to the duties of paragraph V herein and the reporting requirements of paragraph VI herein. The Executive Director for Personnel of the Board of Education shall administer all voluntary, inter-district transfers from one district to another, subject to the duties of paragraph V herein and the reporting requirements of paragraph VI herein.

IV. Reassignment:

If persons from Group A, Group B, or Group C who have been excessed are reassigned to appropriate supervisory vacancies, such reassignments shall be done.

A. in such a manner that $(A+B)/(A+B+C)$ does not decrease unless there are no excessed supervisors from Group A or Group B available for reassignment; and

B. in such a manner that $A/(A+B+C)$ does not decrease unless there are no excessed supervisors from Group A available for reassignment, provided, however, that the ratio may decrease to $A/(A+B+C+1)$ if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group B; and

C. in such a manner that $B/(A+B+C)$ does not decrease unless there are no excessed supervisors from Group B available for reassignment, provided, however, that the ratio may decrease to $B/(A+B+C+1)$ if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group A.

V. Overseers:

A. With respect to all inter-district excessing, associated inter-district transferring, and inter-district re-assigning, [T]he Executive Director for Personnel of the Board of Education shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements.

B. With respect to all intra-district excessing, associated intra-district transferring, and intra-district re-assigning, one person shall be designated as its overseer by each appointing authority and the person so designated (hereinafter "designee") shall take all steps necessary to insure compliance with this order; shall require schools and any other relevant subdivisions of the appointing authority to supply all information necessary to execute this order; and shall require schools and any other relevant subdivisions to act in whatever manner is necessary to execute this order; provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements. The Executive Director for Personnel of the Board of Education shall be responsible for insuring that each designee is making a good faith effort to comply with this order and is complying with this order. If he is not satisfied that a designee is so acting, the Executive Director shall, in his discretion: (1) order the designee to act in any way necessary to execute this order, (2) replace the designee with a person of his choice until the appointing authority designates a new designee, or (3) assume the designee's duties himself until the appointing authority designates a new designee.

VI. Reporting:

A. The defendant [Board of Education] shall furnish to plaintiffs and the CSA copies of all instructions, guidelines, directives, circulars, or orders issued to any appointing authorities, their responsible officers, or other persons in respect to the inter-district excessing, voluntary transferring, or reassigning of supervisors. No later than fifteen (15) days prior to the effective date of any excessing, transferring or reassigning decisions or orders, the defendant shall report to plaintiffs and the CSA the name and Group of all supervisory personnel [to be excessed] affected, the positions [from which they will be excessed] which they will leave, the positions to which they will be transferred or reassigned, if any, and data or computations on the basis of which defendant[s] concludes that such excessing [and transfers] transferring, or reassigning will comply with this order.

B. Each designee shall furnish to plaintiffs, the Executive Director of Personnel, and the CSA copies of all instructions, guidelines, directives, circulars, or orders issued by himself or his appointing authority, its responsible officers, or other persons respecting the intra-district excessing, voluntary transferring, or reassigning of supervisors. No later than fifteen (15) days prior to the effective date of any excessing, transferring, or reassigning decisions or orders, each designee shall report to

plaintiffs, the Executive Director, and the CSA the name and Group of all supervisory personnel affected, the positions which they will leave, the positions to which they will be transferred or reassigned, if any, and data or computations on the basis of which the designee concludes that such excessing, transferring, or reassigning will comply with this order.

VII. Duration:

This order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1977; provided, however, that this order shall not apply to any intra-district excessing, transferring, or reassigning which occurred before November 22, 1974.

VIII. Construction:

To the maximum extent possible, this order shall be construed consistently with all other relevant laws, contracts, policies, by-laws, and agreements. In particular, it shall not be construed to prejudice or limit the defendant's rights, if any, to create a preferred pool of excessed supervisors and/or to reassign or appoint them to vacancies wherever situated in the New York City public school system. Further, this order shall not be construed to prejudice or limit the excessed

supervisors' rights, if any, to return to vacancies in their home districts.

Dated: February 7th, 1975

/s/ H.R. TYLER, jr.

U.S.D.J.

APPENDIX B

SECTION 703(h) DOES NOT PROTECT SENIORITY SYSTEMS WHICH PERPETUATE THE EFFECTS OF PAST DISCRIMINATION

Appellants contend that Section 703(h) of Title VII immunizes employment date seniority systems from judicial alteration and that this provision imposes a limitation on the relief which can be granted in this action brought under Sections 1981 and 1983. Although this argument that the remedies available under Section 1981 are in any way limited by Title VII must fall in the light of the Supreme Court's holding in Johnson v. Railway Express Agency, 43 U.S.L.W. 4623 (May 19, 1975) (see discussion at pp.20-22, supra), we shall, in this appendix, respond to appellants' argument that Section 703(h) protects employment date seniority systems, as embodied in the existing rules, from change.

1. Neither the Language of 703(h) Nor Its Place in the Statutory Scheme Justifies the Construction Advanced By Appellants

Section 703(h), 42 U.S.C. §2000e-2(h), provides in pertinent part:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system. . .

This provision is one subsection of Section 703 of Title VII, which defines what are (§§ 703(a)-(d), 42 U.S.C. §§ 2000e-2(a)-(d)), and are not (§§ 703(e)-(j), 42 U.S.C. §§ 2000e-2(e)-(j)), employment practices made unlawful by the Act. Section 703(h) does not by its terms or statutory context state anything about the nature or scope of judicial power to remedy such practices.

On its face, the pertinent clause of §703(h) simply states that an employer does not discriminate by using a "bona fide seniority or merit system." Neither in that section nor in any other part of the Title VII did Congress define what it meant to include under the umbrella of a "bona fide" seniority system.^{1/} Other clauses of § 703(h) exempt from Title VII's prohibitions an employer's use of "a system which measures earnings by quantity or quality of production," different compensation or employment conditions for "employees who work in different locations," or the use of "any professionally developed ability test."^{2/} All these authorizations are subject to the section's caveat against otherwise lawful practices that are "the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Section 703(h) must be read in light of the broad prohibitions of §§ 703(a), (c), 42 U.S.C. §§ 2000e-2(a), (c). Those provisions generally define unlawful employment practices by employers and unions respectively, and are cast in sweeping and inclusive terms. Their broad language would appear to prohibit any discriminatory employment practice by a subject entity, unless it is specifically authorized elsewhere.^{3/} Section 703(h) is therefore a clarification

^{1/} Nor does the legislative history contain any specification of exact meaning, see pp. 4bb-12bb infra.

^{2/} See Griqqs v. Duke Power Co., 401 U.S. 424 (1971).

^{3/} See, e.g., Local 189, United Papermakers and Paperworkers v. United States, supra, 416 F.2d at 982; Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972); Griqqs v. Duke Power Co., supra, 401 U.S. at 429-31 (1971).

or qualification of §§ 703(a), (c) —that is, a clarification of which employer and union practices Congress meant to prohibit and which to permit.

Section 703(h) is not part of the remedial scheme of Title VII. Judicial remedies under the Act are set out in §706(f)-(k), 42 U.S.C. §§ 2000e-5(f)-(k), and particularly in §706(g), 42 U.S.C. §2000e-5(g). Section 706(g) is as broad in its grant of remedial power to the District Courts as §§ 703(a) and (c) are in their definition of unlawful practices. It authorizes the award, upon a finding of liability, of "such affirmative action as may be appropriate," including but not limited to "reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate" (emphasis supplied).

Congress intended §706(g) to give district courts plenary powers to fashion complete relief appropriate to the facts of each case. It clarified and reiterated that intention in passing the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972), which reenacted §706(g) (with modifications not material here). The Section-by-Section analysis prepared by the Senate-House Conference Committee states of §706(g):

The provisions of this subsection are intended to give the court wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present Section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position

where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) emphasis supplied).

The Supreme Court has previously noted the broad sweep of §706(g) and the Congressional purpose underlying it, Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44-5. Nowhere, in the language or structure of Title VII, did Congress indicate that 703(h) was to be construed as a limitation on the grant of authority contained in §706(g).

The construction given §703(h) by the courts in Waters v. Wisconsin Steel Works, supra, and Jersey Central Power & Light Co. v. Local Union 327, 508 F.2d 687 (3rd Cir. 1975) in effect reads its definitional limitations into §706(g)'s remedial authorization. Although they thereby treated the separate subsections as a unit, these courts made no effort to discuss the terms of §706(g) or reconcile them with the meaning they found in §703(h). The Supreme Court's and Congress's understanding of the clear meaning of §706(g) cannot be reconciled with those decisions.

2. The Legislative History of Section 703(h) Does Not Support the Construction Urged by Appellants

Appellants' interpretation of Section 703(h) would strip the District Courts of their traditional power to devise effective equitable remedies appropriate to the circumstances of each case—a power that is particularly crucial in civil rights litigation. Such a statutory construction should not be adopted in the absence of clear indications that Congress intended to impose a limitation on relief which is nowhere expressed in the statute's terms and is on its face inconsistent with Title VII's broad remedial

purpose. The legislative history^{4/} provides no basis for the limiting construction of §703(h). Courts have carefully examined the legislative history of Title VII in ruling on the issue presented by this case —and have arrived at opposite conclusions.^{5/} As these diverse results indicate, the legislative history of §703(h) does not on its face reveal any Congressional intention with respect to the question presented.

The bill that eventually became Title VII^{6/} did not, as initially introduced, contain §703(h), its language, or indeed any limiting provision on seniority. On the contrary, a dissenting minority of the House Judiciary Committee, which reported the bill out with favorable recommendation, argued that the

^{4/} The judicial search for the meaning of statutory provisions leads first to the text of the statute and then to its purpose; it is primarily as an aid to deciphering an unclear or disputed purpose that the courts look to the legislative history. Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535-44 (1947).

^{5/} Compare, e.g., Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309, 1317-20 (7th Cir. 1974), cert. filed February 21, 1975; and Jersey Central Power & Light Co. v. Local Union 327 et al., 508 F.2d 687, 706-10 (3rd Cir. 1975); with Watkins v. United Steel Workers of America, Local No. 2369, 369 F. Supp. 1221, 1227-29 (E.D. La. 1974), appeal docketed 5th Cir. No. 74-2604 (June 17, 1974).

^{6/} H.R. 7152 (1963), see H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

bill would destroy all seniority systems.^{7/} The bill's proponents made no effort to refute these statements. An amendment to exempt from Title VII's proscriptions all employment practices based on a seniority system was defeated on the House floor.^{8/} The bill passed the House without any seniority provision, 110 Cong. Rec. 2804 (1964), and went directly to the Senate floor where it was extensively debated in the course of a prolonged filibuster. There the bill's co-sponsor, Senator Clark, placed in the record on April 8, 1964, three documents commenting on the bill's effect upon seniority rights. At the time of these insertions, the bill still contained neither §703(h) nor any specific seniority language. The three documents are an Interpretative Memorandum prepared by the Department of Justice, 110

^{7/} The minority protested that,

If the proposed legislation is enacted, the President of the United States and his appointees—particularly the Attorney General— would be granted the power to seriously impair . . . the seniority rights of employees in corporate and other employment [and] the seniority rights of labor union members within their locals and in their apprenticeship program. . .

The provisions of this act grant the power to destroy union seniority. . . . with the full statutory powers granted by this bill, the extent of actions which would be taken to destroy the seniority system is unknown and unknowable. H. Rep. No. 914, 88th Cong., 1st Sess. 64-66, 71-72 (emphasis supplied). See also, 110 Cong. Rec. 2726 (1964) remarks of Rep. Dowdy).

^{8/} The proposed amendment provided "[t]he provisions of this title shall not be applicable to any employer whose hiring and employment practices are pursuant to (1) a seniority system. . . ." 110 Cong. Rec. 2727 (1964). It was rejected. 110 Cong. Rec. 2728 (1964)

^{9/}
Cong. Rec. 7206-07, the "Clark-Case Interpretative Memorandum,"
^{10/}
110 Cong. Rec. 7212-15, and a set of prepared answers by Senator
Clark to questions suggested by Senator Dirksen, 110 Cong. Rec.
^{11/}
7215-17. There was no floor debate or commentary on any of
these materials, or of their treatment of the seniority issue,
either when they were introduced or thereafter.

9/The Department of Justice Memorandum states in pertinent
part:

Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race. 110 Cong. Rec. 7207.

10/The "Clark-Case Memorandum," states that:

Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or prefer Negroes for future vacancies, or, once Negroes are hired to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.) 110 Cong. Rec. 7213.

11/Two of the prepared responses are pertinent to the question here.

Question. Would the same situation prevail in respect to promotions when that management function is governed by a labor contract calling for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires that they be first fired and the remaining employees are white?

Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to

The formulation of §703(h) began some weeks later. The section's language first appeared as part of a substitute "Dirksen-Mansfield" bill, authored by a bipartisan leadership group in order to break the filibuster by vote of cloture, see 110 Cong. Rec. 12706-07 (1964). The substitute was introduced by Senator Dirksen on May 26, 1964, 110 Cong. Rec. 11,926, 11930-34, and presented by Senator Humphrey on June 4, 1964, 110 Cong. Rec. 12,708-09, 12,721-22. It replaced the Clark bill in its entirety and modified it substantially.^{12/} Section 703(h) appeared in its final form in the substitute bill, see 110 Cong. Rec. 12,813 (1964). Senator Humphrey, in explaining the addition of §703(h), merely reiterated its terms and commented, "[t]he change does not narrow application of the title, but merely clarifies its present intent and effect," 110 Cong. Rec. 12,723 (1964). The other principal author of the substitute measure, Senator Dirksen, did not

be the 'last hired,' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race. 110 Cong. Rec. 7217.

* * *

"Question. If an employer is directed to abolish his employment list because of seniority discrimination, what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."

^{12/}The Senatorial deadlock that produced the substitute was not to any significant extent over seniority. The proscriptions on employment discrimination contained in the Title VII bill were merely one part of an historic omnibus bill which also had controversial titles prohibiting, inter alia, discrimination in public accommodations (Title II, see 42 U.S.C. §§ 2000a et seq.) and in federally-assisted programs including public and private schools (Title VI, see 42 U.S.C. §§ 2000d et seq.). Even limiting the analysis to Title VII provisions, the critical issue was not over seniority but whether EEOC should have any enforcement powers and if so of what nature ("cease-and-desist" or right to sue in federal court). See, e.g., 110 Cong. Rec. 12,721-22 (1964) (remarks of Senator Humphrey).

explain the new section except by briefly repeating its terms in conclusionary fashion, 110 Cong. Rec. 12,818-19 (1964). No other Senator, including Senators Clark and Case, attempted to debate or amend (or even discussed) §703(h) before final passage of Title VII. After the Senate passed the Mansfield-Dirksen substitute and just before House passage, the bill's House Manager, Rep. Celler, explained the changes made in H.R. 7152 by the substitute Title VII measure, 110 Cong. Rec. 15,896 (1964). Although he noted a number of trivial changes,^{13/} as well as significant modifications including the provision of §703(h) permitting non-discriminatory ability tests, Rep. Celler did not mention its "bona fide seniority system" language, *id.* After final passage of Title VII Rep. McCullough, "who had much to do with the passage and also the preparation of the civil rights bill," 110 Cong. Rec. 15,998 (1964) (remarks of Sen. Dirksen), prepared a comparative analysis of the original House-passed bill and the final Senate version. That analysis notes that the House version lacked any §703(h) provision, but describes the Senate-added section solely as authorizing use of professionally developed ability tests, 110 Cong. Rec. 16,002 (1964). Senator Dirksen, introducing this analysis to the Senate, described it as "highly informative." 110 Cong. Rec. 15,998 (1964).

^{13/} Among the minor revisions Rep. Celler called to the attention of House members were the deletion of a section exempting discrimination against atheists, an exemption for Indian-owned corporations, and the application of the Hatch Act to EEOC employees. 110 Cong. Rec. 15,896 (1964).

Reliance on the three undebated Clark memoranda as expressing the legislative purpose of §703(h) is unwarranted. The memoranda were inserted in the record weeks before §703(h) was conceived. None of the substitute's architects, nor indeed any other Congressman, drew any specific link between the memoranda and the section. The Senators principally responsible for Title VII as enacted, including §703(h), stated that it was not designed to change or narrow the Act's prohibitions. The Representatives most knowledgeable and concerned about the House Bill, which had overruled the strong protests of some members in rejecting any seniority limitations, did not advise the House that any change had been made in its position by the Senate version. In order to sustain appellants' reading of §703(h) as imposing a severe restriction on the application of Title VII to seniority systems, it would be necessary to assume that the Congressmen most intimately involved in Title VII's final enactment either were unaware of the secret meaning of the section, or chose to conceal it from their colleagues.^{14/}

Moreover, the courts have already indicated in a closely related context^{15/} that they do not take the Clark materials at face value to define the content of §703(h). Read literally, the three insertions would seem to declare Title VII without

^{14/}To adopt that assumption "would be like sanctioning the practice of Caligula who 'published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it'." Screws v. United States, 325 U.S. 91, 96 (1945) (opinion of Mr. Justice Douglas concurring in judgment).

^{15/}The context is that of the "job seniority" cases, see p. supra.

any effect on established seniority rights.^{16/} Yet the courts have unanimously rejected that notion as inconsistent with the true Congressional purpose.^{17/} They reason quite simply that a "bona fide" seniority system within the meaning of §703(h) is one that does not have racially discriminatory effects; those that have such effects are "the result of an intention to discriminate on the basis of race" and are specifically exempted from the qualification of §703(h).^{18/} The Clark statements there-

^{16/} See, e.g., the following statements:

"Title VII would have no effect on seniority rights existing at the time it takes effect." Department of Justice Interpretative Memorandum, 110 Cong. Rec. 7207 (1964).

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." Clark-Case Interpretative Memorandum, 110 Cong. Rec. 7213 (1964).

"Answer: The bill is not retroactive, and it will not require an employer to change existing seniority lists." Clark-Dirkser responses, 110 Cong. Rec. 7217 (1964).

^{17/} See, e.g., Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 515-8 (E.D. Va. 1968) ("It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the Act"); Local 189, United Papermakers and Paperworkers v. United States, *supra*, 416 F.2d at 988, 996; Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971); and see Watkins v. United Steelworkers of America, Local No. 2369, *supra*, 369 F. Supp. at 1228-9. Appellants maintain that this Court's language in United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 661, supports their construction of Section 703(h), that is, that later hired minorities cannot be given seniority rights at the expense of whites hired earlier. This argument was rejected in Patterson v. Newspaper and Mail Deliverers' Union, *supra*, 9 EPD at p. 7273.

^{18/} Quarles v. Philip Morris, Inc., *supra*, 279 F. Supp. at 517; Local 189, United Papermakers and Paperworkers v. United States, *supra*, 416 F.2d at 995-6; United States v. Bethlehem Steel Corp., *supra*, 446 F.2d at 659.

fore do not express the will of Congress as to seniority. Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1611-1614 (1969).

There is simply no clear legislative history to support the meaning affixed to §703(h) by appellants. This conclusion is not surprising; as this and other courts have remarked, Title VII's broad terms and tortured Congressional history often provide faint guidance along the path to specific constructions.^{19/}

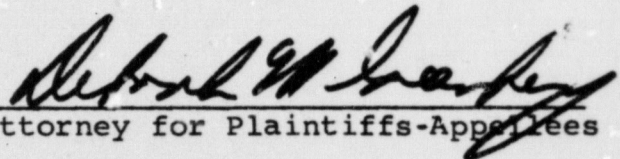
^{19/}Alexander v. Gardner-Denver Co., supra, 415 U.S. at 57; Voutsis v. Union Carbide Corp., 452 F.2d 889, 891-2 (2nd Cir. 1971), cert. denied 406 U.S. 918 (1972); Local 189, United Papermakers and Paperworkers v. United States, supra, 416 F.2d at 987; Johnson v. Seaboard Air Line R. Co., 405 F.2d 645, 649, 651 (4th Cir. 1968), cert. denied 394 U.S. 918 (1969); Miller v. International Paper Co., 408 F.2d 283, 286 n. 13 (5th Cir. 1969).

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 1975
I served two copies of the foregoing Brief for Plaintiffs-
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